Supreme Court, U.S.
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No. 92-935

In the Supreme Court of the United States

OCTOBER TERM, 1992

SETH WARD, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an order issued by the state court of appeals after removal of the case to federal court is entitled to *res judicata* effect.

2. Whether the attempt of the Resolution Trust Corporation to raise its federal defenses after removal of the case to federal court is an impermissible collateral attack on a state-court judgment.

3. Whether the Resolution Trust Corporation may raise special defenses granted to it by federal law for the first time after a trial-court judgment if the Resolution Trust Corporation did not become a party to the case until after the trial court entered judgment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 972 F.2d 196.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 3, 1992. Pet. App. 13. The petition for a writ of certiorari was filed on December 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed an action in 1987 in the Circuit Court of Pulaski County, Arkansas, seeking real estate sales commissions he claimed were owed to him by Madison Guaranty Savings and Loan Association (Madison Guaranty) and Madison Financial Corporation (Madison Financial), a wholly owned subsidiary of Madison Guaranty. After a jury trial, the state trial court affirmed the existence of the commission agreement alleged by petitioner and entered judgment in his favor in September 1988. The Madison entities appealed to the Arkansas Court of Appeals. Pet. 5; Pet. App. 2a-3a, 14a-16a.

2. While the appeal was pending, the Federal Home Loan Bank Board declared Madison Guaranty insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. Pursuant to Section 501(a) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 370 (codified at 12 U.S.C. 1441a(b)(6) (Supp. II 1990)), the Resolution Trust Corporation (RTC) succeeded FSLIC as conservator on August 9, 1989 (the date FIRREA was enacted).[1] Pursuant to 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), the RTC as conservator removed the case to the United States District Court for the Eastern District of Arkansas on September 25, 1989. Pet. App. 22a-25a.[2]

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[1] The RTC subsequently became receiver. Pet. App. 3a.

[2] FSLIC had attempted to remove the case to federal court in March 1989, pursuant to 12 U.S.C. 1730(k)(1). The federal district court rejected the removal petition and the court of appeals dismissed FSLIC's appeal of the remand order for want of jurisdiction. *In re RTC*, 881 F.2d 564 (8th Cir. 1989). After passage of FIRREA, the court of appeals granted the petition for rehearing filed by the RTC as conservator, and reinstated the appeal. The court of appeals thereafter dismissed the appeal as moot in light of

3. After it had removed the case to federal court, the RTC as conservator and Madison Financial filed a motion in the Arkansas Court of Appeals asking that court to release the original record for use in the federal court. Pet. App. 26a-28a. After petitioner objected and sought dismissal of the appeal, Madison Financial and the RTC as conservator, responded by explaining that their removal of the case to federal court divested the state court of jurisdiction. *Id.* at 29a-34a. On October 25, 1989, the state court of appeals dismissed the appeal based on the failure of the RTC and the Madison entities to file a brief on the merits of the appeal. *Id.* at 35a-37a. It did not address the jurisdictional question, but instead denied the motion seeking release of the record "until such time as this court receives a proper request or order from th[e federal district] court." *Id.* at 35a.[3]

4. Respondents (the RTC as receiver and Madison Financial) then filed a motion asking the federal district court to vacate the state trial-court judgment under Federal Rule of Civil Procedure 60(b), so that the court could consider respondents' defenses under *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1821(d)(9) and 1823(e) (Supp. II 1990). The district court denied the motion without opinion and entered judgment for petitioner in accordance with the judgment of the state trial court. Pet. App. 7a-8a.

5. The Court of Appeals for the Eighth Circuit reversed. Pet. App. 1a-6a. It first concluded that the state appellate court's order of dismissal was void because it

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the clear propriety of the subsequent removal under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990). *Ward* v. *RTC*, 901 F.2d 694, 694-695 (8th Cir. 1990).

[3] Respondents filed a motion for reconsideration in the Arkansas Court of Appeals, but the motion was denied without opinion. Pet. App. 70a-71a.

was entered after the case was removed to federal court. *Id.* at 4a-5a. The Eighth Circuit rejected petitioner's claim that respondents were barred from challenging the order because they chose not to appeal it in the state courts, explaining that respondents "had no need to appeal the order further" because it "was void." *Id.* at 4a. The Eighth Circuit similarly rejected petitioner's claim that the order of dismissal precluded any challenge in the federal courts, reasoning that "[b]ecause the state appellate court's order dismissing the state appeal is void, the state court judgment lacks preclusive effect as a final judgment." *Id.* at 5a. Finally, the Eighth Circuit rejected petitioner's claim that respondents waived federal jurisdiction by asking the state appellate court to release the record to the federal district court. It noted that the "motion did not request a ruling on the merits of the appeal or an abandonment of federal jurisdiction," and indeed that the papers respondents filed in the state courts contended that the basis for the relief they sought was the existence of federal jurisdiction. *Ibid.*

Turning to respondents' defenses on the merits, the Eighth Circuit noted that they were not available to the Madison entities at the time of trial and that the RTC "did not become a party and had no opportunity to raise the *D'Oench* and section 1823(e) defenses until after the state trial." Pet. App. 6a. Accordingly, it concluded that respondents were entitled to raise those defenses at this time, and it remanded the case to the district court for consideration of those defenses. *Ibid.*

ARGUMENT

1. Petitioner first argues (Pet. 13-17) that the Eighth Circuit erred in declining to give preclusive effect to the decision of the Arkansas Court of Appeals dismissing respondents' appeal from the state trial court's judgment, which petitioners characterize as a ruling that the state

court had jurisdiction even after the RTC in its capacity as conservator removed the case to federal court. That claim is meritless.

First, the RTC, acting in its capacity as conservator, properly removed the case to federal court. Section 1441a(*l*)(2) of Title 12, United States Code (Supp. II 1990), provides that the "Corporation shall be substituted as a party in any civil action * * * to which its predecessor in interest was a party with respect to [certain institutions that had failed before passage of FIRREA]." Subsection (3) then provided:

> The Corporation may, without bond or security, remove any such action * * * from a State court to the United States District Court for the District of Columbia, or if the action * * * arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located.[4]

Petitioner does not dispute that Madison Guaranty was one of the institutions described in Section 1441a(*l*)(2) and that the RTC as conservator therefore was properly substituted as a party. It follows that the removal by the RTC as conservator was proper.[5] Because the removal

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[4] Section 1441a(a)(2) (Supp. II 1990) provides that all references to the "Corporation" in Section 1441a refer to the RTC. Section 316 of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, 105 Stat. 1772 (codified at 12 U.S.C. 1441a(*l*)(3) (Supp. III 1991)), amended Section 1441a(*l*)(3) in respects not relevant to the issues raised by the petition.

[5] Petitioner has not asked the Court to review the propriety of the removal. Petitioner conceded the propriety of the removal before the court of appeals in proceedings concerning the first

was proper, it is clear that the state court did not have the power to proceed further in the case. 28 U.S.C. 1446(d) ("[A]fter [completion of the procedures for removal] the State court shall proceed no further unless and until the case is remanded."); see *Meyerland Company* v. *FDIC*, No. D-2893 (Tex. Jan. 27, 1993) (relying on Section 1446(d) to support vacating appellate court's dismissal of appeal as void because case was removed to federal court before dismissal).[6] The state court's later

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removal. See *Ward* v. *RTC*, 901 F.2d 694, 694 (8th Cir. 1990).

[6] Contrary to petitioner's suggestion (Pet. 13-14), there is no reason to doubt the applicability of 28 U.S.C. 1446(d) to this case. Where the removal powers granted to the federal banking authorities under Title 12 do not address procedural questions resolved by the general removal provisions of Title 28, the courts regularly have held the general removal provisions of Title 28 applicable to cases removed by the Resolution Trust Corporation under the powers granted to it in Title 12. See, *e.g.*, *FDIC* v. *Meyerland Co.* (*In re Meyerland Co.*), 960 F.2d 512, 520-521 (5th Cir. 1992) (en banc) ("FIRREA's lack of mechanics of removal necessitates reliance on the general schema [in 28 U.S.C. 1446]."), cert. denied, No. 92-590 (Jan. 4, 1993); *Lazuka* v. *FDIC*, 931 F.2d 1530, 1536 (11th Cir. 1991) ("[FIRREA] evidence[s] Congress's intent that the FDIC adhere in most respects to general removal procedure."). Both of the cases on which petitioner relies consider whether specific provisions of 12 U.S.C. 1441a(*l*) bar the applicability of arguably conflicting provisions of Title 28. See *RTC* v. *Key*, 733 F. Supp. 1086, 1089 (N.D. Tex. 1990) (considering whether time for removal is governed by general provision set forth in 28 U.S.C. 1446(d) or provisions of 12 U.S.C. 1441a(*l*)(3)(A) and (B) (Supp. II 1990)); *FSLIC* v. *Westgate Partners Ltd.*, 726 F. Supp. 807, 809 (D. Colo. 1989) (considering whether court to which federal entity could remove case was governed by general provisions of 28 U.S.C. 1441 or 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990)), aff'd, *RTC* v. *Westgate Partners Ltd.*, 937 F.2d 526 (10th Cir. 1991). Petitioner identifies no provision of FIRREA that casts any doubt on the applicability of the rule of 28 U.S.C. 1446(d) that a state court has no authority to act after removal of a case from its jurisdiction.

dismissal of the appeal in this case therefore was void.[7]

Petitioner contends (Pet. 13-17) that even if the decision of the state court to dismiss the appeal was void, it was binding on respondents as a matter of *res judicata*; petitioner argues that when a court expressly determines a question litigated by the parties before it—even a jurisdictional question—those parties are precluded from further litigation of the question. The problem with that argument here is that the state court did not address or resolve the jurisdictional question. The only issue decided in the opinion of the state court of appeals was that the appeal should be dismissed based on respondents' failure to file briefs in accordance with the briefing schedule established by the state court, Pet. App. 35a—a schedule that itself ceased to have any significance after the case was removed to federal court.[8] Accordingly, because the state court did not actually decide the jurisdictional question, there would have been

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[7] See, *e.g.*, *Metropolitan Casualty Insurance Co.* v. *Stevens*, 312 U.S. 563, 566 (1941) ("proceedings in the state court subsequent to the petition for removal * * * are void if the cause was removable"); *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882) ("Upon [compliance with the procedures for removal] the jurisdiction of the State court absolutely ceased * * * . Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored."); *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 842 (1st Cir. 1988); 14A Charles Alan Wright et al., *Federal Practice and Procedure* § 3737, at 551-553 (2d ed. 1985).

[8] Indeed, the second paragraph of the opinion makes it clear that the state court of appeals was not considering the propriety of the removal, because the court stated that it was refusing to release the record "until such time as this court receives a proper request or order from [the federal district] court." Pet. App. 35a. If the court had determined that its jurisdiction was proper, it would have had no reason to dispose of the motion in that manner; it presumably would have denied the motion outright.

no basis for the Eighth Circuit to find respondents precluded from further litigation of that issue. See 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4420, at 184-185 (1981) ("[I]f there is no showing as to the issues that were actually decided, there is no issue preclusion.").[9]

Moreover, petitioner's argument fails to take account of the context in which his claim of preclusion arises. Although we may assume that issue preclusion principles generally would allow one court's final judgment that incorporated the resolution of a jurisdictional question to bind another court on the same question in a different case, the ruling on which petitioner relies was made by a state court in a case that already had been removed to federal court. In that situation, there is only one lawsuit, not two, so the prerequisite for application of preclusion principles—a final and definitive resolution of the case in the state court system followed by a separate suit in federal court—is absent here. Instead, the proper mode of analysis is to ascertain what determinations had been made before the time the case was removed, and to consider whether ordinary principles of judicial efficiency justify reconsidering those determinations. Determinations purportedly made by a state court *after* removal (such as dismissal of the appeal in this case) are a nullity and may be disregarded.[10] The court of appeals properly applied those principles, and its decision therefore does not warrant review.

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[9] Because the state court did not actually decide the jurisdictional question, petitioner's reliance (Pet. 15-17) on *Durfee* v. *Duke*, 375 U.S. 106 (1963), is misplaced.

[10] Compare *Kern* v. *Huidekoper*, 103 U.S. 485, 492-493 (1881) (trial held by state court after removal has no effect on proceedings in federal court even though removing party participated in the state court trial).

2. Petitioner also contends (Pet. 18-22) that because respondents failed to pursue appellate remedies in the Arkansas Supreme Court after the state appellate court dismissed the appeal, their motion in the federal district court to set aside the state trial court's judgment is an impermissible collateral attack that violates the *Rooker-Feldman* doctrine, as applied by this Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981). That contention is frivolous. As *Moitie* makes clear, the *Rooker-Feldman* doctrine prohibits relitigation in a subsequent action of issues a party lost in an earlier action. 452 U.S. at 398 ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). That principle does not apply here, because respondents have not initiated a new action in the federal district court challenging a final judgment entered by the state courts in a separate action. They have removed the same action that was filed in the state courts to federal court before entry of a final nonappealable judgment, and they seek to have set aside, in that same action, certain rulings made before the RTC became a party. Accordingly, the case does not involve a collateral attack on a final judgment, but rather unexceptional steps in a pending case to secure reconsideration of rulings respondents believe to be incorrect.

3. Finally, petitioner argues (Pet. 22-25) that the court of appeals erred in allowing respondents to assert defenses that were not raised by the Madison entities at the time of the state-court trial, before the RTC became a party. In cases where the RTC and the FDIC have special federal-law defenses that were not available to a failed institution at the time of trial (because the federal entity became a party to the case after the trial), the courts consistently have allowed the federal entity to

raise such defenses for the first time on appeal. See, *e.g.*, *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332, 1342-1344 (1st Cir. 1992) ("[I]t would have been unfair to prevent the FDIC from raising its federal defenses when it had no such opportunity to assert them before the bankruptcy court."); *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160, 1163-1164 (5th Cir. 1992); *RTC* v. *McCrory*, 951 F.2d 68, 71 (5th Cir.) ("[T]he federal regulator had no opportunity to raise its special defense in the trial court, and * * * it should not be penalized on appeal for that lack of opportunity."), cert. denied, 113 S. Ct. 459 (1992); *Baumann* v. *Savers Federal Savings & Loan Association*, 934 F.2d 1506, 1512-1513 (11th Cir. 1991) ("RTC * * * should not be penalized for not raising a defense it had no opportunity to present."), cert. denied, 112 S. Ct. 1936 (1992); see also *RTC* v. *Winslow*, 12 Cal. Rptr. 2d 510, 516-517 (Ct. App. 1992).

Petitioner argues (Pet. 24-25) that it would be unfair to allow respondents to raise their claims at this time, because the relevant books and records have been dispersed or because FSLIC was supervising Madison Guaranty at the time of the state-court trial (before the institution failed and FSLIC became its conservator). Those arguments are meritless. First, the record in this case establishes that the commission agreement was not in the official books and records of Madison Guaranty, was never considered or approved by the Board of Directors, and was not executed on the date the parties allegedly agreed to it. C.A. App. 35, 61-62, 96-97, 131-132. Because those facts are adequate to establish the elements necessary to respondents' defenses, any arguable difficulties in obtaining complete records do not establish a sufficient element of unfairness to require the court to refrain from adjudicating those defenses.

Second, FSLIC's informal supervision of Madison Guaranty would not have allowed Madison Guaranty to assert the defenses on which respondents rely in this case; those defenses do not protect entities for which no receiver or conservator has been appointed. See 12 U.S.C. 1821(d)(9) and 1823(e) (Supp. II 1990); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 459-461 (1942). FSLIC was not a party to the litigation at the time of the trial and thus had no power to raise these defenses. Hence, the existence of FSLIC's prior supervision does not affect the RTC's ability to raise the defenses after it became conservator and then receiver of Madison Guaranty.

Petitioner also errs in claiming (Pet. 22) that the courts of appeals have reached inconsistent results in this area. None of the decisions he cites is inconsistent with the rule described above. In *Olney Savings and Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d 266 (5th Cir. 1989), the FDIC attempted to press a *D'Oench, Duhme* claim to protect an asset (a participation agreement) that a trial court had rescinded before the FDIC became a party, based on misrepresentations that the FDIC characterized as unrecorded side agreements. *Id.* at 274. Because the trial court had rescinded the agreement before the FDIC took over the institution that owned the agreement, the court of appeals reasoned that the FDIC never acquired the asset and thus ruled that the FDIC's federal defenses could not apply with respect to that agreement. *Id.* at 275. That reasoning, whatever its merits, is not inconsistent with the decision of the court of appeals in this case.

The other federal appellate decisions on which petitioner relies are even further afield.[11] *Thurman* v.

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[11] The two state-court decisions on which petitioner relies are also unhelpful to his position. In *Larsen* v. *FDIC/Manager Fund*, 835 S.W.2d 66 (Tex. 1992), the Texas Supreme Court concluded as

FDIC, 889 F.2d 1441, 1447 (5th Cir. 1989), declined to accept post-judgment defenses that would not have changed the outcome of the trial court's decision; the defenses in this case would have resulted in judgment for the defendant.[12] *Grubb* v. *FDIC*, 833 F.2d 222, 225-226 (10th Cir. 1987), held only that supersedeas bonds posted to secure a stay of execution are not assets of a receiver on whose behalf special federal law defenses may be asserted; it did not address the ability of the FDIC to press such defenses with respect to claims that would reduce the assets of the estate of the failed institution. Finally, in *FDIC* v. *Hadid*, 947 F.2d 1153, 1157 (4th Cir. 1991), the court in fact upheld the assertion of a *D'Oench, Duhme* defense for the first time on appeal in a case in which the FDIC succeeded to the bank's interest in a judgment in the bank's favor.[13]

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a matter of state law that state procedural rules would not permit a party to raise on appeal claims that were not raised at trial. *Id.* at 74. The court in *Northwest Land & Investment, Inc.* v. *New West Federal Savings and Loan Association*, 827 P.2d 334 (Wash. Ct. App. 1992), declined to allow a party to raise new defenses on remand that it failed to raise during an appeal to which it was a party. *Id.* at 337-338. In this case, the RTC raised its defenses in its capacity as receiver at its first opportunity in the district court.

[12] In any event, the Fifth Circuit's decisions in *5300 Memorial, supra*; *McCrory, supra*; and *Union Federal Bank* v. *Minyard*, 919 F.2d 335, 336 (5th Cir. 1990), make it clear that the Fifth Circuit follows a rule consistent with the decision of the Eighth Circuit in this case.

[13] Because the Eighth Circuit allowed respondents to raise their defenses based on general principles of federal law, it had no occasion to consider respondents' argument that 12 U.S.C. 1821(d)(13) (Supp. II 1990) grants respondents an express right to do so. That provision grants the RTC as conservator or receiver "all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity." The RTC, acting

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in its capacity as receiver, argued below that because rights under *D'Oench, Duhme* and Section 1823(e) are among "the rights and remedies available to the corporation in its corporate capacity," it may raise those arguments whenever it enters a case before the entry of an unappealable final judgment. At least three courts of appeals, however, have rejected that argument. See *604 Columbus Avenue*, 968 F.2d at 1342-1343; *Baumann*, 934 F.2d at 1511-1512; *Olney*, 885 F.2d at 275.